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October 29, 2003

Mr. Corbin Davis, Clerk
Michigan Supreme Court
Michigan Hall of Justice
P.O. Box 30052
Lansing, MI 48909

Re: Administrative File No. 2002-30
Proposed amendment to MCR 2.105

Dear Mr. Davis:

I write to recommend against adoption of the proposed amendment to MCR 2.105(I)(1) that would prohibit notice by publication in cases where personal jurisdiction over a defendant is sought.

The proposal is based on a suggestion by Wayne Circuit Judge William J. Giovan. Judge Giovan, in his June 27, 2002 letter to the Court, expressed the view that due process does not allow notice by publication in a case where personal jurisdiction is required because notice by publication is not reasonably calculated to give actual notice to the defendant. While I have great respect for Judge Giovan's scholarly abilities (confirmed by our work together as co-authors of West Group's Civil Procedure Before Trial), I must respectfully disagree with him in this instance.

In *Krueger v Williams*, 410 Mich 144, 300 NW2d 910 (1981), this Court stated that "publication notice is permissible under the Due Process Clause in certain limited situations." 410 Mich at 165-166, 300 NW2d at 918. In that case* plaintiff was in an auto accident with drivers who could not be located. The circuit court approved notice

* *Krueger* consolidated two cases. It is the second case, *Rodgers v Davis*, that is the subject of discussion here and that discussed the question whether the "rule authorizes service of process by publication to obtain personal jurisdiction over a defendant." 410 Mich at 152-153, 300 NW2d at 912.

by publication under GCR 1963, 105.8, the predecessor of MCR 2.105(I). The defendants' insurer challenged service when plaintiffs attempted to collect a default judgment from the insurer.

In *Krueger,* the Supreme Court discussed the requirements of notice under the due process clause, relying in large part on the U.S. Supreme Court's holding in *Mullane v Central Hanover Bank & Trust Co,* 339 US 306, 70 S Ct 652, 94 L Ed 865 (1950). The Court stated:

> The court is given the discretion to implement any method for service of process beyond those set out in other rules when it is shown that in the context of a given situation other methods are not reasonable. This omnibus rule is meant to allow flexibility, and as long as the means chosen meet *Mullane's* standards, service will be allowed.
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> It is important to note that *Mullane* acknowledged the possibility that the means chosen would never reach the defendant.
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> > "(I)t has been recognized that, in the case of persons missing or unknown, employment of an indirect and even a probably futile means of notification is all that the situation permits and creates no constitutional bar to a final decree foreclosing their rights." *Mullane, supra,* 339 U.S. p. 317, 70 S.Ct. p. 658.

410 Mich at 158-159, 300 NW2d at 914-915.

In discussing the propriety of notice by publication, the Court noted two important points: First, "due process does not require that actual notice be given in every case." 410 Mich at 165, 300 NW2d at 918. Second, "When circumstances make it doubtful that actual notice will be effected, the method used may not be substantially less likely to afford notice than other customary substitutes." *Id.* The Court thus concluded that service by publication is proper in the rare circumstance where it is the best means available.

Given this case authority, the proposed amendment would prohibit the use of notice by publication where it would be constitutionally permissible. There is no good reason to eliminate this option and thus deprive a plaintiff of the possibility of obtaining a judgment when notice by publication (alone or in combination with other attempts to give notice) is the best means available. That situation may arise particularly "in the

case of persons missing or unknown." *Mullane,* 339 US at 317. In those situations, "employment of an indirect and even a probably futile means of notification is all that the situation permits and creates no constitutional bar to a final decree foreclosing their rights." *Id.* (holding notice by publication was sufficient for trust beneficiaries "whose interests or whereabouts could not with due diligence be ascertained").

It is true, as Judge Giovan notes, that practitioners may seek notice by publication in instances where it is not warranted, since that is an easy means of dealing with a case where actual service presents difficulties. The solution to this is not to bar all use of notice by publication in in personam cases. Rather it is to scrupulously enforce the requirement of MCR 2.105(I)(1) that a plaintiff seeking notice by publication show that service cannot reasonably be made in any other manner provided under MCR 2.105 and that the proposed service by publication (alone or in combination with other means—such as mailings, service of business associates or family members, facsimile service, email service) is "reasonably calculated to give the defendant actual notice" under the standards of *Mullane* and *Krueger.*

Krueger stands for the proposition that a court considering use of notice by publication must give searching inquiry to a plaintiff's claim that it is necessary:

> The rule recognizes that substituted service in an extraordinary case is not an automatic right. After consideration of all the relevant circumstances of the individual case, it is the court that must make an independent evaluation regarding available alternative methods of service consistent with the guarantees of due process.
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> A truly diligent search for an absentee defendant is absolutely necessary to supply a fair foundation for and legitimacy to the ordering of substituted service.
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> Under this rule, the use of publication as a notice-giving device should be limited to discrete circumstances where a strong specific factual showing is made that notice cannot reasonably be effectuated in the manner provided under other rules and that means which are better calculated to give notice than publication are not reasonably available or feasible.

410 Mich at 159, 168, 170, 300 NW2d at 915, 919, 920. The court should make this evaluation in light of the fact that there is almost always a better means of giving notice

than publication. In reviewing U.S. Supreme Court precedent in *Krueger,* the Court noted that "in every instance where alternate means of giving notice were available which were better calculated to give actual notice, the Court held service of process by publication constitutionally deficient." 410 Mich at 166, 300 NW2d at 918. Applying this standard in *Krueger,* the Court sent the case back to the trial court for further proceedings because the plaintiffs did not make the proper showing to allow service by publication. *Krueger* exemplifies the proper means of dealing with requests for service by publication. No rule amendment is necessary, since this simply enforces the present requirements of MCR 2.105(I).

In sum, the standards set out under *Mullane* and *Krueger* are sufficient to limit the use of service by publication. The rules should not be amended to bar its use where it is constitutionally permissible.

Sincerely,

Richard Bisio

cc: Hon. William J. Giovan
Ronald Longhofer, Chair,
State Bar Committee on Civil Procedure and Courts

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